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No. 08-___

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IN THE

OFFICE OF THE CLERK

Supreme Court of the United States

PHARMACIA CORPORATION, PFIZER, INC., FRED HASSAN, DR. G. STEVEN GEIS AND CARRIE COX,
Petitioners,

v.

ALASKA ELECTRICAL PENSION FUND, CITY OF SARASOTA FIREFIGHTERS' PENSION FUND, INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 132 PENSION PLAN, NEW ENGLAND HEALTH CARE EMPLOYEES PENSION FUND, PACE INDUSTRY UNION-MANAGEMENT PENSION FUND AND CHEMICAL VALLEY PENSION FUND OF WEST VIRGINIA, AS CLASS REPRESENTATIVES, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Third Circuit err with respect to the following questions concerning the statute of limitations for a claim under Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act"):

a. Under what circumstances is the "inquiry notice" standard triggered by the existence of "storm warnings" that would cause a reasonable investor to investigate his or her claims?

b. Do "storm warnings" exist when the plaintiff is on notice of facts contradicting the defendant's allegedly false statements?

c. Is a plaintiff on "inquiry notice," and does the limitations period begin to run only when the plaintiff becomes aware, without conducting an investigation, of evidence supporting each element of its claim, including evidence of the defendant's fraudulent intent?

2. Did the Third Circuit err in holding that the complaint adequately pleads scienter for purposes of a claim under Section 10(b) of the Exchange Act where the Third Circuit failed to engage in any analysis of the plaintiff's scienter allegations, let alone the analysis required by this Court in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499 (2007)?

RULE 14.1(b) STATEMENT

The Petitioners, Defendants-Appellees below, are Pharmacia Corporation, Pfizer, Inc., Fred Hassan, Dr. G. Steven Geis and Carrie Cox.

The Respondents, Plaintiffs-Appellants below, are Plaintiffs Alaska Electrical Pension Fund, City of Sarasota Firefighters' Pension Fund, International Union of Operating Engineers Local 132 Pension Plan, New England Health Care Employees Pension Fund, Pace University Union-Management Pension Fund, and Chemical Valley Pension Fund of West Virginia, purporting to act on behalf of themselves and all others similarly situated.

RULE 29.6 STATEMENT

Petitioner Pfizer, Inc., states that it has no parent corporation, that no publicly held corporation owns more than 10% of its stock and that it owns 100% of the stock of Petitioner Pharmacia Corporation.

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PHARMACIA CORPORATION, PFIZER, INC., FRED HASSAN, DR. G. STEVEN GEIS AND CARRIE COX,
Petitioners,

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ALASKA ELECTRICAL PENSION FUND, CITY OF SARASOTA FIREFIGHTERS' PENSION FUND, INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 132 PENSION PLAN, NEW ENGLAND HEALTH CARE EMPLOYEES PENSION FUND, PACE INDUSTRY UNION-MANAGEMENT PENSION FUND AND CHEMICAL VALLEY PENSION FUND OF WEST VIRGINIA, AS CLASS REPRESENTATIVES, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at *Alaska Electrical Pension Fund v. Pharmacia Corp.*, 554 F.3d 342 (3d Cir. 2009) (the "Opinion") (reprinted in the Appendix

("App.") hereto at App. 1a). The Order denying Petitioners' motion for rehearing *en banc* is not reported (App. 22a). The opinion of the United States District Court, District of New Jersey, is reported at 2007 WL 3231791 (D.N.J. Oct. 30, 2007) (App. 24a).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on January 30, 2009. The order denying Petitioners' motion for rehearing *en banc* was entered on March 3, 2009. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The first question presented by this petition involves 28 U.S.C. § 1658, which provides in relevant part:

> (b) [A] private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. § 78c(a)(47)), may be brought not later than the earlier of – (1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation.

28 U.S.C. § 1658(b).

The second question presented by this petition involves 15 U.S.C. § 78u-4(b) of the Private Securities Litigation Reform Act ("PSLRA"), which provides:

> (2) In any private action arising under this chapter in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint

> shall, with respect to each act or omission alleged to violate this chapter, state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.

15 U.S.C. § 78u-4(b)(2).

INTRODUCTION

This case presents the significant questions of (1) when the limitations period begins to run on a federal securities fraud claim, including the standard for determining "inquiry notice," and (2) whether federal courts must undertake the analysis mandated by this Court in *Tellabs* to assess the sufficiency of a complaint's scienter allegations in an action brought under Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act").

Following this Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350 (1991), and the enactment of 28 U.S.C. § 1658(b), a plaintiff is required to commence an action under Section 10(b) of the Exchange Act within either "(1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation," whichever date is earliest. 28 U.S.C. § 1658(b). The Courts of Appeals generally agree that the limitations period begins to runs when the plaintiff either is on "inquiry notice" or "actual notice" of its claim. However, the Courts of Appeals are divided with respect to when "inquiry notice" exists and how "inquiry notice" is determined. Until recently, the Courts of Appeals generally analyzed the statute of limitations inquiry on the basis of when the plaintiff became aware of facts suggesting the possibility of fraud, that is, when the plaintiff became aware of facts contradicting the defendant's prior statements.

These facts are commonly referred to as "storm warnings." Certain Courts of Appeals hold that a plaintiff is on "inquiry notice," thus triggering the limitations period, when the plaintiff becomes aware of facts constituting "storm warnings." Other Courts of Appeals hold that the existence of "storm warnings" obligates the plaintiff to undertake a diligent investigation to ascertain its claims. If the plaintiff does not undertake a diligent investigation, the statute of limitations begins to run from the time the "storm warnings" occur. Still other Courts of Appeals hold that the existence of "storm warnings" does not obligate the plaintiff to investigate, but that the limitations period runs when the plaintiff would have uncovered facts supporting a claim had it undertaken an investigation in response to the "storm warnings".

In 2008, in *Betz v. Trainer Wortham & Co.*, 519 F.3d 863 (9th Cir.), *pet. for cert. filed*, 76 U.S.L.W. 3646 (U.S. May 27, 2008) (No. 07-1489), and in *In re Merck & Co. Securities, Derivative & "ERISA" Litigation*, 543 F.3d 150 (3d Cir. 2008), *pet. for cert. filed*, 77 U.S.L.W. 3437 (U.S. Jan. 15, 2009) (No. 08-905), the Ninth and Third Circuits, respectively, adopted an entirely different approach to the statute of limitations analysis. Those cases held that "storm warnings" do not exist – and, thus, "inquiry notice" cannot be triggered – until the plaintiff, without having undertaken any investigation, becomes aware of evidence supporting each element of its claim. The approach taken by these Courts contravenes, indeed ignores, the fundamental purpose of "inquiry notice" – to encourage the timely filing of securities fraud claims by requiring plaintiffs to use reasonable diligence in determining the existence of their claims – and is directly at odds with the "inquiry notice" standards in the other Circuits.

In its Opinion in the instant action, the Third Circuit purported to reaffirm its holding in *Merck*, but further exacerbated the split among the circuits. The Third Circuit held that the public disclosure of facts directly contradicting a defendant's allegedly false statements are not "storm warnings" suggesting the possibility of fraud which trigger a plaintiff's duty to investigate its claims. The Third Circuit further held that "storm warnings" only exist where a defendant is publicly accused of acting with fraudulent intent or publicly admits that it acted with fraudulent intent. Thus, the Opinion effectively eliminated the "inquiry notice" standard in favor of an "actual notice" standard, and, accordingly, eviscerated the application of the two-year limitations period in 28 U.S.C. § 1658(b). In so doing, the Third Circuit also disregarded federal securities law doctrines established by this Court and contradicted federal securities law principles adopted by other Courts of Appeals.

As discussed in the petitions for *certiorari* filed in *Betz* and *Merck*,[1] this split of authority among the circuits results in circumstances where the same federal securities fraud claim will be allowed to proceed in some circuits, and will be time-barred in others. The existence of different "inquiry notice" standards thwarts Congress's intent, confirmed in *Lampf*, to establish a uniform national standard governing the statute of limitations for federal securities fraud claims. The split will continue to cause the inconsistent application of federal law to the same statutory

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[1] *See* Petition for a Writ of Certiorari, *Trainer Wortham & Co. v. Betz*, No. 07-1489 (U.S. May 27, 2008); Petition for a Writ of Certiorari, *Merck & Co. v. Reynolds*, No. 08-905 (U.S. Jan. 15, 2009).

claims, encourage plaintiffs to forum-shop and create substantial uncertainty for litigants. Accordingly, this Court should grant Petitioners' petition for a writ of certiorari and resolve this split of authority.

The Third Circuit also erred in holding that the complaint adequately pled scienter. In *Tellabs*, this Court held that "to determine whether a complaint's scienter allegations [in a Section 10(b) action] can survive threshold inspection for sufficiency, a court governed by § 21D(b)(2) [of the PSLRA] must engage in a comparative evaluation; it must consider, not only inferences urged by the plaintiff... but also competing inferences [of non-fraudulent intent] rationally drawn from the facts alleged," and that "[t]o qualify as 'strong' within the intendment of § 21D(b)(2)... an inference of scienter must be more than merely plausible or reasonable – it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent." *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 127 S. Ct. 2499, 2504-05 (2007).

In its Opinion, the Third Circuit affirmed the District Court's Order denying Petitioners' motion to dismiss, but, like the District Court, did not engage in any analysis of the complaint's scienter allegations, let alone the analysis required by *Tellabs*. Had the Third Circuit done so, it necessarily would have concluded that the inferences in the complaint of nonfraudulent intent overwhelm any inferences of fraudulent intent. Indeed, had the Third Circuit conducted an appropriate analysis of the Respondents' scienter allegations, it would have concluded that the complaint sets forth no allegations of Petitioners' fraudulent intent, but, rather, only allegations that are routinely held to be insufficient to raise a strong inference of scienter as required by the PSLRA.

STATEMENT

Celebrex is a non-steroidal anti-inflammatory drug ("NSAID") developed by Pharmacia and is used primarily to alleviate pain and inflammation caused by arthritis. In April 2000, Pharmacia publicly disclosed the results of a clinical drug trial called the "Celebrex Long Term Arthritis Safety Study," ("CLASS"). CLASS was designed to assess the gastrointestinal ("GI") safety profile of Celebrex so that Pharmacia could petition the Food and Drug Administration ("FDA") for a favorable change in the warning label for Celebrex. Pharmacia disclosed that Celebrex failed to meet the objectives of the original CLASS protocol. *See* JA:0086-88 (analyst report stating that "[f]or the endpoint 'ulcers and complications'... Celebrex was statistically superior....However for the higher hurdle, 'complications' only, Celebrex... miss[ed] statistical significance....Unfortunately, this was the pre-determined 'primary endpoint' of the trial").[2] Pharmacia stated, however, that the data nevertheless suggested the possible superiority of Celebrex over traditional NSAIDs. JA:0050-55 (at 0050).

In June 2000, Pharmacia submitted a "Briefing Document" to an advisory committee of independent experts appointed by the FDA (the "FDA Advisory Committee" or "Committee"). JA:0354-456. The Briefing Document contained the complete CLASS data and set forth, among other things, (1) an analysis based upon data from the entire study period and pursuant to the original study protocol and (2) an alternative analysis based upon six months of data

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[2] "JA:___" refers to the Joint Appendix that was filed by the parties in the Third Circuit.

and a different set of GI safety criteria than had been specified in the original study protocol (the "Alternative Analysis"). *Id.*

In September 2000, Petitioner Geis and 15 other doctors and scientists not employed by Pharmacia published an article regarding the results of CLASS in the Journal of the American Medical Association (the "JAMA Article"). JA:0039-47. The JAMA Article acknowledged that Celebrex failed to demonstrate statistically significant superiority based on the criteria prescribed in the original CLASS protocol. Based upon Pharmacia's Alternative Analysis, however, the JAMA Article concluded that "[t]he study determined that [Celebrex] when used for 6 months...is associated with lower incidence of combined clinical upper GI events than Comparator NSAIDs...." JA:0045-46.

In February 2001, the FDA posted to its website the Briefing Document as well as reports by three FDA staff members who analyzed CLASS data from the entire study period (together with the Briefing Document, the "FDA Disclosures"). JA:0354-679. It is undisputed that the FDA Disclosures made clear that (i) CLASS lasted longer than 6 months, (ii) the original study protocol did not include certain GI events that were used in Pharmacia's Alternative Analysis and, (iii) when analyzed according to the original protocol, there was no statistically significant difference between Celebrex and the comparator NSAIDs. The FDA staff members disagreed with Pharmacia's Alternative Analysis (which was set forth in the JAMA Article and Briefing Document), calling it "not valid" and "not convincing" and opining that "the most critically relevant analysis covers the complete study period as specified in the original

protocol." JA:0658-79 (at 0665-66); JA:0459-552 (at 0472, 0482); JA:0555-654 (at 0637-38). One FDA staffer's report stated that "after the study ended the sponsor added a new set of analyses that was based on the first six months of study instead of the entire study period," and opined that Pharmacia "has not adequately justified the value of an analysis limited to 6-month data nor adequately justified replacing the original analysis with this post-hoc analysis." JA:0481. The FDA Advisory Committee also held a public hearing on February 7, 2001, during which the Advisory Committee criticized and rejected Pharmacia's Alternative Analysis. At the hearing, the Committee recommended that the FDA not modify the Celebrex warning label. *See* JA:0980-1214 (at 1213); JA:1516.

The conclusions and criticisms in the FDA Disclosures, as well as the FDA Advisory Committee's recommendations, were published on the FDA's public website and were widely reported by securities analysts and the media. JA:1494-574. For example, in a February 7, 2001 report, J.P. Morgan Securities stated that, according to the FDA reviewers, "Pharmacia's analysis of data at only the 26 week [6 month] time point, rather than the 52 week time point, is unjustified and invalid." JA:0713-16 (at 0714). The same report noted that "[b]oth the Gastrointestinal Reviewer and the Statistical Reviewer so strongly disagreed with Pharmacia's analysis of the data at the 26 week time point that both specifically did not discuss or treat those results, focusing instead their entire discussion on the end-of-study data," and summarized in detail the FDA staff members' reasons for rejecting the Alternative Analysis. JA:0715. According to Respondents' expert affidavit, Pharmacia's stock price declined by a

statistically significant amount on February 7 and 8, 2001, following the FDA Disclosures. JA:1281-450 (at 1301).

In August 2001, the Washington Post published another article based on the February 2001 FDA Disclosures. JA:0203-04. That article asserted that Petitioners "had withheld the full CLASS study data from JAMA;" that JAMA editors felt "disheartened;" and that Dr. Michael Wolfe, a member of the FDA Advisory Committee, was "flabbergasted" upon learning in February 2001 that CLASS lasted longer than six months. JA:0203. There was no reaction in Pharmacia's stock price on August 6, 2001, the first trading day after publication of the Washington Post article; on August 7, 2001, Pharmacia's stock price actually increased. JA:0917.

On June 7, 2002, notwithstanding the Committee's recommendation, the FDA announced that it had approved a label change for Celebrex to include CLASS data based on an analysis not pre-specified in the original protocol, instead using GI safety criteria similar to Pharmacia's Alternative Analysis, but only 9 months of data. JA:0212-13; JA:1602-25.

A. Respondents' Suit

On April 7, 2003, Respondents commenced this action asserting violations of Section 10(b) and 20(a) of the Exchange Act. Respondents alleged that Petitioners made false and misleading claims regarding the results of CLASS in press releases and the JAMA Article. Respondents complained that the JAMA Article was misleading because it was based on only 6 months' data from a 13 month study and used GI safety criteria that differed from those set forth in the original study protocol. Respondents'

complaint was based on facts that were disclosed to the market on the FDA website and in numerous media articles and analyst reports in February 2001, more than two years before the complaint was filed. It is undisputed that Respondents never conducted an investigation of their claims. JA:0243 ¶ 5.

B. The District Court Denies Petitioners' Motion To Dismiss

On December 22, 2003, Petitioners moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) arguing, among other things, that the complaint failed to adequately plead scienter, an essential element of a claim under Section 10(b). By Order dated May 19, 2004, the District Court, without any analysis, denied Petitioners' motion to dismiss. On appeal, Petitioners argued that the District Court erred in denying Petitioners' motion to dismiss because, among other things, Respondents' allegations of an "inference of scienter" were not as cogent or compelling as any competing inferences of non-fraudulent intent as required under *Tellabs*.

C. The District Court Grants Petitioners' Summary Judgment Motion

In May 2007, Petitioners moved for summary judgment, pursuant to Fed. R. Civ. P. 56, arguing, in part, that Respondents' complaint was time-barred because Respondents did not commence their action within two years of the date they were on "inquiry notice" of their claims. 28 U.S.C. § 1658(b). The District Court determined that information posted on the FDA website and widely reported in the media and in analyst reports in February 2001 contradicted Petitioners' alleged misrepresentations about the CLASS results and, as such, constituted "storm warn-

ings" that triggered Respondents' duty to investigate. The District Court also found that Respondents conducted no investigation of the "storm warnings" and that Respondents did not file their complaint until April 7, 2003, more than two years after they were on notice of the "storm warnings." Accordingly, the District Court dismissed the complaint.

D. The Third Circuit Reverses

Respondents appealed the District Court's Order granting summary judgment to Petitioners. Petitioners cross-appealed from the District Court's decision denying their motion to dismiss the complaint. On January 30, 2009, a panel of the Third Circuit Court of Appeals issued its Opinion reversing the District Court's order granting summary judgment dismissing Respondents' securities fraud claims as time-barred and again, without any analysis whatsoever, affirming the District Court's order denying Petitioners' motion to dismiss the Complaint for failure to adequately plead scienter. App. 18a-19a.[3]

On February 13, 2009, Petitioners filed a petition for rehearing *en banc*. On March 3, 2009, the Third Circuit denied Petitioners' petition for rehearing *en banc*.

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[3] The District Court had previously granted Respondents' motion for class certification, holding that the class period ended on February 6, 2001. The District Court held that the class period ended at the time that Respondents were on "inquiry notice" of their claims that Petitioners' statements about the CLASS results were false and misleading. Respondents also appealed the District Court's Order ending the class period in February 2001. Petitioners cross-appealed the District Court's Order granting class certification. The Third Circuit affirmed the District Court's Order certifying a class, but reversed with respect to the class end date. App. 19a-20a.

REASONS FOR GRANTING THE WRIT

I. THERE IS A SUBSTANTIAL SPLIT OF AUTHORITY CONCERNING THE COMMENCEMENT OF THE LIMITATIONS PERIOD FOR A SECTION 10(b) CLAIM

A plaintiff is required to commence an action under Section 10(b) within either "(1) 2 years after the discovery of the facts constituting the violation; or (2) 5 years after such violation," whichever date is earliest. 28 U.S.C. § 1658(b). All circuit courts that have considered the issue agree that either "actual notice" or "inquiry notice" is sufficient to trigger the limitations period for Section 10(b) claims. *See Cook v. Avien, Inc.*, 573 F.2d 685, 695 (1st Cir. 1978); *LC Capital Partners, LP v. Frontier Ins. Grp., Inc.*, 318 F.3d 148, 154 (2d Cir. 2003); *In re NAHC, Inc. Sec. Litig.*, 306 F.3d 1314, 1325 (3d Cir. 2002); *Howard v. Haddad*, 962 F.2d 328, 330 (4th Cir. 1992); *Jensen v. Snellings*, 841 F.2d 600, 606 (5th Cir. 1988); *New Eng. Health Care Empls. Pension Fund v. Ernst & Young, LLP*, 336 F.3d 495, 500 (6th Cir. 2003); *Kauthar SDN BHD v. Sternberg*, 149 F.3d 659, 670 (7th Cir. 1998); *Great Rivers Coop. of S.E. Iowa v. Farmland Indus., Inc.*, 120 F.3d 893, 896 (8th Cir. 1997); *Betz*, 519 F.3d at 874; *Sterlin v. Biomune Sys.*, 154 F.3d 1191, 1196 (10th Cir. 1998); *Theoharous v. Fong*, 256 F.3d 1219, 1228 (11th Cir. 2001). However, at least two distinct and conflicting standards (with several variations) concerning "inquiry notice" appear to have been adopted among the circuit courts, creating a circumstance where the same federal securities fraud claim may be viable in one circuit, but time-barred in another.

The Fourth and Eleventh Circuits appear to commence the limitations period as soon as "storm

warnings" of "possible" fraud exist that would prompt a reasonable investor to investigate whether it had been defrauded. *See, e.g., GO Computer, Inc. v. Microsoft Corp.*, 508 F.3d 170, 179 (4th Cir. 2007); *Franze v. Equitable Assur.*, 296 F.3d 1250, 1254-55 (11th Cir. 2002).[4]

In the First, Sixth, Seventh and Tenth Circuits, the limitations period appears to commence on the date when the plaintiff becomes aware, through "storm warnings" or otherwise, of the possibility that it has been defrauded and, having exercised reasonable diligence, should have discovered the facts underlying the fraud. *See, e.g., Young v. Lepone*, 305 F.3d 1, 9-10 (1st Cir. 2002); *New Eng. Health*, 336 F.3d at 501; *Fujisawa Pharm. Co. v. Kapoor*, 115 F.3d 1332, 1334 (7th Cir. 1997); *Sterlin*, 154 F.3d at 1201. The Ninth Circuit purports to follow this approach. *Betz*, 519 F.3d at 876.

In the Second Circuit, the limitations period appears to commence on the date when "storm warnings" exist of the possibility of fraud. If the plaintiff demonstrates that it conducted an investigation, the limitations period runs from the time a reasonably diligent investor would have discovered the facts underlying the fraud. However, if the plaintiff conducts no investigation, the limitations period runs from the occurrence of the "storm warnings." *LC Capital*, 318

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[4] The Fifth and Eighth Circuits likewise appear to trigger the limitations period as soon as a plaintiff is on notice of "storm warnings" of possible fraud, provided that a reasonably diligent inquiry could have uncovered the facts supporting a fraud claim within the limitations period. *See, e.g., Bodenhamer v. Shearson Lehman Hutton, Inc.*, 998 F.2d 1013 (TABLE), 1993 WL 277033, at **2-3 (TEXT IN WESTLAW) (5th Cir. 1993); *Jensen*, 841 F.2d at 606-07; *Great Rivers*, 120 F.3d at 898.

F.3d at 154. The Third Circuit purports to follow a similar approach, but, as set forth below, its actual application of the standard for determining when the limitations period commences conflicts with the approach of the other circuits, except the Ninth. *See In re Merck*, 543 F.3d at 161, 166.

This split of authority, which, in and of itself can be outcome determinative of the viability of a Section 10(b) claim, has been exacerbated by a further split of authority created by recent decisions in the Third and Ninth Circuits.

A. The Third And Ninth Circuits Exacerbate The Split Of Authority With Respect To The Inquiry Notice Standard

The overwhelming majority of circuit courts, including the Third Circuit prior to its 2008 decision in *Merck*, have repeatedly and routinely held that "storm warnings" – that is, information that would cause a reasonable investor to investigate his or her claims – consist of "suspicious facts" (*New Eng. Health*, 336 F.3d at 501) or information contradicting or calling into question a defendant's prior representations. *See Cook*, 573 F.3d at 697-98; *LC Capital*, 318 F.3d at 155; *GO Computer*, 508 F.3d at 179; *Kennedy v. Josephthal & Co.*, 814 F.2d 798, 802 (5th Cir. 1987); *Whirlpool Fin. Corp. v. GN Holdings, Inc.*, 67 F.3d 605, 610 (7th Cir. 1995); *Fujisawa*, 115 F.3d at 1335; *Great Rivers*, 120 F.3d at 897-98; *Sterlin*, 154 F.3d at 1203-04; *Tello v. Dean Witter Reynolds, Inc.*, 494 F.3d 956, 970 (11th Cir. 2007). In each of these circuits, "storm warnings" consist of information that indicates only the "possibility," of fraud, and need not consist of evidence concerning each element

of plaintiff's claim.[5] In that regard, to constitute "storm warnings," information need not indicate that the defendant acted with scienter. *See New Eng. Health*, 336 F.3d at 502 (rejecting plaintiff's argument that it was not on "inquiry notice" because it could not have known that defendant's statement was knowingly or recklessly false until after discovery, holding that "direct evidence of scienter is not necessary to a determination of fraud"); *Theoharous*, 256 F.3d at 1228 (rejecting plaintiff's argument that she was not on inquiry notice "because she could not reasonably have known...that the defendants had acted with...scienter"); *Betz*, 519 F.3d at 867-68 (Kozinski, C.J., dissenting) ("The panel cites no authority supporting its curious notion that an investor isn't on inquiry notice until he has concrete proof of every element of his claim, including scienter. There *is* no such authority; ten circuits disagree") (emphasis in original).

In contrast, following *Merck* and *Betz*, in the Third and Ninth Circuits, "storm warnings" that trigger a duty to investigate only exist where the plaintiff becomes aware of evidence supporting each element of its claim, including "evidence that the defendants had intentionally or deliberately and recklessly misled" the plaintiff or information that contains

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[5] Certain circuit courts have held that "storm warnings" consist of information indicating a "probability" of fraud. *See, e.g., Newman v. Warnaco Grp., Inc.*, 335 F.3d 187, 193 (2d Cir. 2003). The "probability" and "possibility" articulations of the standard do not appear to lead to different results in the "inquiry notice" analysis. In *Merck*, the Third Circuit purported to resolve an ambiguity created by the use of both "possibility" and "probability" in its decisions by adopting the "possibility of fraud" as the appropriate standard, but then failed to apply that standard. 543 F.3d at 164.

"accusatory intent" and indicates that the defendant engaged in "malfeasance" or "intentional impropriety." *See Betz*, 519 F.3d at 878; *In re Merck*, 543 F.3d at 166. Thus, Respondents' claims in this action are viable today only because the Third Circuit departed from the overwhelming weight of authority – including its own prior decisions[6] – and adopted a standard for "inquiry notice" that effectively eliminates the concept altogether; once a plaintiff becomes aware of all the elements of its claim, there is nothing left for the plaintiff to investigate. As such, the Ninth and Third Circuit's "inquiry notice" standards are the functional equivalent of an "actual notice" standard, rendering meaningless the two year limitations period under 28 U.S.C. § 1658(b).

This split of authority already has prompted two pending petitions for *certiorari* from the decisions in *Betz* and *Merck*. As set forth in those petitions, the "inquiry notice" rule in the Third and Ninth Circuits is fundamentally inconsistent with the purpose of "inquiry notice": to encourage investors to "tak[e] the actions necessary to bring the fraud to light," *Brumbaugh v. Princeton Partners*, 985 F.2d 157, 162 (4th Cir. 1993), and "discourage [them] from adopting a wait-and-see approach" to their investments. *Sterlin*, 154 F.3d at 1202. In contrast, the Third and Ninth Circuits' standard encourages a plaintiff to sit on its

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[6] *See Mathews v. Kidder, Peabody & Co.*, 260 F.3d 239, 252 (3d Cir. 2001) (storm warnings include "'the accumulation of information over a period of time that conflicts with representations that were made when the securities were originally purchased'") (citation omitted); *see also In re NAHC*, 306 F.3d at 1325-26 (same); *Benak ex rel. Alliance Premier Growth Fund v. Alliance Capital Mgmt., L.P.*, 435 F.3d 396, 400 (3d Cir. 2006) (same); *DeBenedictis v. Merrill Lynch & Co.*, 492 F.3d 209, 216 (3d Cir. 2007) (same).

hands notwithstanding evidence of possible fraud and wait for information sufficient to plead a claim to appear fortuitously. This standard permits plaintiffs to ignore "storm warnings" and discourages potential plaintiffs from promptly taking action to uncover and stop potential fraud.

B. The Opinion Below Further Exacerbated The Split Of Authority Regarding "Inquiry Notice"

In its Opinion below, the Third Circuit reaffirmed its holding in *Merck* and further exacerbated the split among the circuits. In so doing, the Opinion disregarded federal securities law doctrines that have been well-established in this Court and contradicted federal securities law principles in other circuits. The Third Circuit's application of its "inquiry notice" standard demonstrates that its deviation from the approach taken by the other Circuits (except the Ninth) effectively eliminates the concept of "inquiry notice" for purposes of the statute of limitations on a Section 10(b) claim.

The Third Circuit held that the FDA Disclosures in February 2001 – which specifically and directly contradicted Petitioners' alleged misrepresentations about the CLASS results – were not "storm warnings" that triggered Respondents' investigatory obligation and, because Respondents did not conduct an investigation, the commencement of the "inquiry notice" limitations period. The Third Circuit held that the FDA Advisory Committee's public disclosure of the facts that revealed the so-called "truth" regarding each of the alleged misrepresentations on which Respondents' claims are based, the public disclosure of the FDA staffers' rejection of each of the Petitioners' justifications for the Alternative Analysis as "not

justified" and "invalid," and the significant media and analyst coverage of these matters, was not sufficient to put Respondents on "inquiry notice." According to the Third Circuit,

> [t]he totality of the evidence in the public realm as of February 2001 did not indicate a possibility of fraud or even hint at any **malfeasance or intentional impropriety**; rather, the evidence only supported the view that there existed a legitimate dispute over scientific and statistical models. **But for inquiry notice of § 10(b) claims, we require some reason to suspect that defendants did not genuinely believe the accuracy of their statements.**

App. 17a (emphasis added). According to the Court, the FDA staff reports contained "highly complex scientific and statistical analysis," and the "few words and phrases," that impugned the Petitioners "lack[ed] accusatory intent" and were "buried like needles in a haystack." App. 14a.[7]

Instead, the Third Circuit held that an August 5, 2001 Washington Post article – which asserted that Petitioners "had withheld the full CLASS study data from JAMA" as well as the personal opinions of the JAMA editors and Dr. Wolfe that the JAMA Article

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[7] The finding that these conclusions were "buried like needles in a haystack" is contradicted by the undisputed record evidence. App. 14a. As the Court specifically noted, in an analyst report dated February 7, 2001, "JP Morgan wrote that the [FDA] staff reports called the six-month analysis 'unjustified and invalid.'" App. 7a. The Court also noted that "the staff reports... received substantial media attention." App. 7a. Thus, whether or not those conclusions were buried in the staff report, securities analysts and the media disseminated them to the market.

misled them – was the first "storm warning" because the article purportedly indicated that Petitioners engaged in malfeasance and did not believe in the validity of the Alternative Analysis. Nothing, however, in the Washington Post article addresses the validity of Pharmacia's Alternative Analysis or the veracity of Petitioners' belief in it.[8] Thus, not only was there no evidentiary basis for the Third Circuit's holding, but the holding renders the concept of "storm warnings" devoid of content and meaning.

The Third Circuit's analysis not only reflected its departure from the other circuits (except the Ninth Circuit) with respect to the fundamental "inquiry notice" standard, but also raised the bar even higher for a defendant to establish "inquiry notice" than was the case in *Merck*. In so doing, the Opinion widens the circuit split even further than did *Merck*. Specifically, in *Merck*, plaintiffs claimed that Merck misre-

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[8] The Third Circuit's identification of the Washington Post article as the "storm warning" triggering event is problematic because the article itself was triggered by the FDA Disclosures in February 2001. JA:0203. If the FDA Disclosures were sufficient to motivate the Washington Post to undertake an investigation of the purported discrepancies between the JAMA Article and the FDA Disclosures, certainly investors in Pharmacia stock should have been motivated to make a similar investigation. Confronted with the FDA Disclosures, Respondents easily could have contacted the JAMA editors and Dr. Wolfe and learned the same information that was reported by the Washington Post. The "inquiry notice" standard should not permit Respondents to abdicate their investigatory duty and wait to file a complaint until the alleged scheme is revealed through the investigatory efforts of others. *See Brumbaugh*, 985 F.2d at 162 ("Merely bringing suit after the scheme has been laid bare through the efforts of others. . . will not satisfy the requirements of due diligence when there have been prior warnings that something was amiss").

presented the cardiovascular safety profile of an NSAID, Vioxx, by attributing the high cardiovascular adverse event rate in the Vioxx arm of the VIGOR clinical trial to the alleged cardio-protective attributes of a comparator drug, naproxen (the "Naproxen Hypothesis"). Although, in September 2001, the FDA publicly rebuked Merck in a warning letter for promoting the Naproxen Hypothesis, the Court found that the FDA warning letter was not a "storm warning" because it did not give investors "reason to suspect that Merck did not believe the [N]aproxen [H]ypothesis." 543 F.3d at 172. In particular, the *Merck* court stated that "***the FDA did not charge that the [N]aproxen [H]ypothesis was wrong***." *Id.* at 170 (emphasis added). Instead, the Court held, the *Merck* plaintiffs had no reason to suspect that Merck did not believe in the Naproxen Hypothesis until the public disclosure of a study conducted by Harvard University that demonstrated "an increased risk of heart attack in patients taking Vioxx compared with patients taking Celebrex and placebo." *Id.* at 172.

While Petitioners believe that *Merck* was wrongly decided, there is no question that the Harvard Study, found by the *Merck* court to be a "storm warning," is the equivalent of the FDA Disclosures here. Like the Harvard study in *Merck*, the FDA Disclosures contradicted Petitioners' representations about the validity of their Alternative Analysis and the FDA Disclosures ***did*** state that Pharmacia's Alternative Analysis was wrong. Significantly, the FDA Disclosures revealed the so-called "truth" about each one of the misrepresentations alleged in the complaint,[9] were

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[9] Even Respondents' expert acknowledged, in his expert report submitted in connection with Respondents' motion for class

widely reported by the media and securities analysts, and were at least as sufficient as the Harvard study to cause Respondents to suspect that Petitioners' belief in the validity of the Pharmacia Alternative Analysis was implausible or without basis. By holding to the contrary, the Third Circuit defined "storm warnings" in a way that makes it virtually impossible to establish "inquiry notice."

The Third Circuit's attempt to justify its holding that the February 2001 FDA Disclosures were not "storm warnings," further confounds the split of authority over the definition of "storm warnings," and reveals the legal and logical infirmity of its approach. The Third Circuit dismissed the fact that the FDA Disclosures specifically and directly contradicted Defendants' allegedly false statements – which would be dispositive of "storm warnings" in every circuit but the Ninth – on the basis that the FDA Disclosures "did not indicate a possibility of fraud" because they suggested only that there was "a legitimate dispute over scientific and statistical models." App. 13a, 17a. Thus, according to the Third Circuit, the "possibility" that a misrepresentation is the result of fraud is negated by the "possibility" that a misrepresentation is

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certification, that "[f]rom the information available on the FDA's website on February 6, 2001, the astute observer could discern from the FDA reports that the CLASS study lasted longer than six months, and that data from the entire study period failed to demonstrate with statistical or clinical significance any GI safety advantage for Celebrex compared to diclofenac or ibuprofen, either with respect to the pre-determined primary endpoint of complicated ulcers or the combined endpoint of complicated and symptomatic ulcers. The FDA also discussed that Pharmacia's 'combined' endpoint was a post-hoc, retrospective analysis, was not an endpoint of the CLASS study, and did not follow the study protocols." JA:1238.

the result of a good faith misunderstanding or some reason other than fraud. That holding is entirely inconsistent with the concept of "storm warnings" and the purpose of "inquiry notice" and conflicts with rulings in other circuits.

For example, in *Fujisawa*, the Seventh Circuit expressly rejected the plaintiff's argument that it was not put on inquiry notice by the revelation of misrepresentations that arguably were not the product of fraud:

> [Plaintiff's] counsel have done an elaborate dance around the facts known to their client before August of 1991, arguing with great ingenuity that every single one of them can be explained without hypothesizing fraud by [the defendant]. That misses the point. Of course a suspicion may turn out to be unfounded; that doesn't mean that it would not induce a careful person to inquire whether it *was* unfounded.

115 F.3d at 1336 (emphasis in original). In *Tregenza v. Great American Communications Co.*, 12 F.3d 717 (7th Cir. 1993), the Seventh Circuit rejected the same argument. There, the plaintiffs alleged that the defendant misrepresented that a stock was "greatly undervalued," such that it would shortly double in value and would not, in any case, decline in value by more than 10 percent. The court found that the plaintiffs were on "inquiry notice" of a Section 10(b) claim arising from these representations at a point when the stock had lost almost 90 percent of its value, even though the stock price decline "did not *prove* fraud," and notwithstanding that "[defendant] might have believed reasonably and in good faith, though erroneously, that the stock was undervalued." *Id.* at 720 (emphasis in original). According to the

Court, the stark contradiction between the representations made by the defendants and the facts that subsequently became public should have caused "an investor [to] become suspicious and investigate[] when [the defendant's] emphatic and precise prediction was so swiftly and dramatically falsified." *Id.*; *see also GO Computer*, 508 F.3d at 179 ("[f]raud by its nature is something perpetrators take pains to disguise, and plaintiffs' notion that allegedly concealed fraud excuses the need for any diligence on plaintiffs' part would permit statutory periods to be tolled indefinitely, even when plaintiffs could reasonably be expected to bring suit").

The Third Circuit held that the FDA Disclosures did not trigger Respondents' duty to investigate because those documents contained "highly complex scientific and statistical analysis," and the hypothetical ordinary investor need not be a "scientific expert." App. 11a, 14a. The Third Circuit's holding contradicted well-established precedent in other circuits regarding the definition of the hypothetical "reasonable investor" by which "inquiry notice" is evaluated.[10] In that regard, "inquiry notice" is not determined on the basis of a "plaintiff's actual awareness of suspicious circumstances or even on the ability of a

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[10] In any event, Respondents' investments in Pharmacia were managed by professional investment managers who testified during discovery that they understood the February 2001 disclosures about the results of CLASS. JA:0770-806. The Third Circuit also ignored the undisputed record evidence that securities analysts – as is their function in the market – distilled the scientific information in their reports for the benefit of investors. JA:0714-15; JA:0184-85; *see Ross v. Bank S., N.A.*, 885 F.2d 723, 744 (11th Cir. 1989) ("In a well-developed market, market professionals sift through public disclosures for relevant information").

plaintiff to understand their import." *Cetel v. Kirwan Fin. Grp., Inc.*, 460 F.3d 494, 507 (3d Cir. 2006); *see also Greenhouse v. MCG Capital Corp.*, 392 F.3d 650, 656 (4th Cir. 2004) ("it is important to note that a 'reasonable investor' is neither an ostrich, hiding her head in the sand from relevant information, nor a child, unable to understand the facts and risks of investing"). Rather, a plaintiff is deemed to be on notice of all information in the market irrespective of its technical complexity. *Cetel*, 460 F.3d at 507; *see also Eckstein v. Balcor Film Investors*, 8 F.3d 1121, 1129 (7th Cir. 1993) ("Competition among savvy investors leads to a price that impounds all available information, even knowledge that is difficult to articulate"); *Wieglos Commonwealth Edison Co.*, 892 F.2d 509, 516 (7th Cir. 1989) ("[p]rompt incorporation of news into stock price is the foundation for the fraud-on-the-market doctrine and therefore supports a truth-on-the-market doctrine as well"); *Schneider v. Vennard* (*In re Apple Computer Sec. Litig.*), 886 F.2d 1109, 1114 (9th Cir. 1989).

Further, the Third Circuit's holding is inconsistent with the "efficient market" theory adopted by this Court in *Basic Inc. v. Levinson*, 485 U.S. 224 (1988). In *Basic*, this Court established a "fraud on the market" presumption of reliance in Section 10(b) actions based upon the hypothesis that all information about a security, which is traded in an efficient market, is incorporated into the price of that security. *Id.* at 246-47. Respondents' claims in this case are expressly based on the "fraud on the market" theory to establish that they relied on the alleged misrepresentations in the JAMA Article, even though they did not read the Article. JA: 0272-73 ¶¶ 78-79 ("the market for Pharmacia securities digested current information with respect to Pharmacia from all

publicly available sources. . . "). The Third Circuit accepted the allegation that the hypothetical ordinary investor was defrauded by the highly technical JAMA Article, which no lay person could reasonably be expected to understand. At the same time, the Third Circuit held that the FDA Disclosures were not "storm warnings" because they consisted of "a highly complex scientific and statistical analysis." App. 14a. The Third Circuit cannot have it both ways: if the hypothetical ordinary investor can claim to be defrauded by the disclosures in the JAMA Article on the basis of the "fraud on the market" theory, that same investor cannot claim that the FDA Disclosures did not constitute "storm warnings" because they were too technical to understand. *See In re Merck & Co. Sec. Litig.*, 432 F.3d 261, 270-71 (3d Cir. 2005) ("Union is trying to have it both ways: the market understood all the good things that Merck said about its revenue but was not smart enough to understand the co-payment disclosure. An efficient market for good news is an efficient market for bad news").

Finally, the Opinion ignores substantial authority regarding the significance of stock price movement in determining the existence of "storm warnings." *See Young*, 305 F.3d at 13 n.9 (including a 40% drop in the company's stock price as one of the factors that collectively amounted to "storm warnings" of fraudulent activity); *Caprin v. Simon Transp. Servs., Inc.*, 99 Fed. Appx. 150, 156 (10th Cir. 2004) (concluding that a "precipitous decline" in stock price was one of the constitutive elements of "sufficiently threatening storm clouds [that] put the [plaintiffs] on inquiry notice of possible fraudulent activity"). Indeed, in *Merck*, the Third Circuit held that the information known to a plaintiff must be legally "material," as demonstrated by stock price declines, before trigger-

ing a duty to investigate. In that regard, the Court stated that its "past inquiry notice decisions have taken into account the market reaction to disclosures that purportedly constitute storm warnings," and held that the "lack of significant movement in Merck's stock price following the FDA warning letter ... supports a conclusion that the letter did not constitute a sufficient suggestion of securities fraud to trigger a storm warning of culpable activity under the securities laws." 543 F.3d at 167, 171. Thus, in *Merck*, where the Third Circuit found that there was no "significant movement" in the price of Merck stock, the Court applied the principle that stock price movement is indicative of "storm warnings" as a basis to find that there were no "storm warnings."

In contrast, here, where there was a significant stock price decline following the February 2001 FDA Disclosures, the Third Circuit disregarded this principle and held that the stock price decline was not indicative of "storm warnings." Specifically, it is undisputed – indeed, Respondents' expert opined – that Pharmacia's stock price declined by a statistically significant amount following the FDA Disclosures in February 2001. Nevertheless, the Third Circuit held, without any support in the evidentiary record, that "the drop in stock price following the events of February 6-8, 2001 did not indicate fraud or even the possibility of fraud." App. 13a. Rather, the Court speculated that "the drop in price is easily explained by the fact that the market had been expecting that the FDA would approve a label change." App. 13a. The Court's error in disregarding the evidence is made clear by the fact that Pharmacia's stock price did not decline following the publication of the Washington Post article, which the

Third Circuit held to be the applicable "storm warnings" that triggered Respondents' duty to investigate.

The Third Circuit's "inquiry notice" standard not only conflicts with the "inquiry notice" standards established in other circuits, it undermines the purpose and objective of "inquiry notice." Significantly, the Third Circuit's application of its "inquiry notice" standard reveals that it is not an "inquiry notice" standard at all, but, rather, effectively, is an "actual notice" standard. As such, the Third Circuit's Opinion in this action further exacerbates the split among the circuits, even more so than its prior decision in *Merck* and the Ninth Circuit's decision in *Betz*. Accordingly, this Court should grant Defendants' petition to ensure a uniform and appropriate standard for determining when the limitations period commences in an action under Section 10(b).[11]

II. THE THIRD CIRCUIT'S OPINION CONFLICTS WITH PRECEDENT OF THIS COURT BECAUSE IT DID NOT ADDRESS THE ANALYSIS MANDATED BY *TELLABS*

This Court should also grant Petitioners' petition for a writ of *certiorari* on the important question of whether the Third Circuit's Opinion conflicts with the precedent set forth in this Court's decision in

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[11] This Court's determination with respect to the "inquiry notice" standard for purposes of the statute of limitations analysis may also be dispositive of the parties' dispute with respect to the termination date for the class period. Because it would be unreasonable for Respondents to rely on Petitioners' alleged misrepresentations after the appearance of "storm warnings," if the Court determined that the FDA Disclosures were "storm warnings," the class period would have to end on the date of those disclosures.

Tellabs. In *Tellabs*, this Court established a mandatory framework by which lower courts must analyze a complaint's allegations of scienter in connection with a claim under Section 10(b) of the Exchange Act. The Third Circuit, however, engaged in no analysis regarding the adequacy of Respondents' scienter allegations, let alone the analysis mandated by this Court in *Tellabs*. Indeed, the Third Circuit completely disregarded *Tellabs*. Under circumstances where, as here, a federal court completely overlooks or ignores a prior ruling of this Court, certiorari is warranted. *See Horn v. Banks*, 536 U.S. 266, 267 (2002) (granting certiorari because "[i]n avoiding the [analysis required by the Supreme Court in *Teague v. Lane*, 489 U.S. 288 (1989)], the Court of Appeals directly contravened [*Caspari v. Bohlen*, 510 U.S. 383 (1994)]"); *Lambert v. Wicklund*, 520 U.S. 292, 293 (1997) (granting certiorari "[b]ecause the Ninth Circuit's holding is in direct conflict with our precedents"); *United States v. Bass*, 536 U.S. 863-64 (2002) (granting certiorari because "[t]he Sixth Circuit's decision is contrary to [*United States v. Armstrong*, 517 U.S. 456 (1996)]").

The PSLRA enhanced the pleading requirements for claims brought under the Exchange Act. In that regard, the PSLRA requires that a plaintiff asserting a claim under the Exchange Act must "state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2). To bring a claim under Section 10(b), a plaintiff must allege that the defendant acted with scienter, that is, that the defendant acted with fraudulent intent. *Tellabs*, 127 S. Ct at 2507.

In *Tellabs*, this Court addressed the pleading standard for scienter for purposes of the PSLRA. This Court held that a complaint alleging claims under Section 10(b) will survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6) "only if a reasonable person would deem the inference of scienter cogent and at least as compelling as any opposing inference one could draw from the facts alleged." 127 S. Ct at 2510. Moreover, this Court held that a court reviewing a complaint's scienter allegations under the PSLRA must "consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Id.* at 2509. The court must determine whether "*all* of the facts alleged, taken collectively, give rise to a strong inference of scienter...." *Id.* (emphasis in original). When "determining whether the pleaded facts give rise to a 'strong' inference of scienter, the court must take into account plausible opposing inferences." *Id.* A court "must engage in a comparative evaluation; it must consider, not only inferences urged by the plaintiff... but also competing inferences [of nonfraudulent intent] rationally drawn from the facts alleged." *Id.* at 2504.

On December 22, 2003, Petitioners moved to dismiss the complaint pursuant to Fed. R. Civ. P. 12(b)(6) arguing, among other things, that the complaint failed to adequately plead scienter, an essential element of a claim under Section 10(b). By Order dated May 19, 2004, the District Court, without any written analysis, denied Petitioners' motion to dismiss the complaint. On appeal, Petitioners argued that the District Court erred in denying Petitioners' motion to dismiss because, among other

things, Respondents' allegations of an "inference of scienter" were not as cogent or compelling as any competing inferences of non-fraudulent intent as required under *Tellabs*.

The Third Circuit affirmed the District Court's Order denying Petitioners' motion to dismiss. Except for the conclusory statement that "[w]hen examined as a whole... the Amended Complaint is replete with allegations that defendants acted with the requisite scienter" (App. 19a), the Court of Appeals engaged in no analysis whatsoever regarding the adequacy of Respondents' scienter allegations. In particular, the Third Circuit completely failed to undertake any of the comparative analysis required by this Court in *Tellabs*. On this basis alone *certiorari* should be granted to ensure that the lower courts comply with the rulings of this Court.

Had the Third Circuit engaged in the analysis required by *Tellabs*, it necessarily would have concluded that the inferences of non-fraudulent intent overwhelm any inferences of fraudulent intent – indeed, that there were no legally cognizable inferences of fraudulent intent alleged in the complaint.

First, the complaint does not plead particularized facts creating any inference – much less the requisite strong inference – that Petitioners acted with an intent to deceive, manipulate, or defraud. Rather, Respondents' scienter allegations consist of only two paragraphs alleging that:

- Because of their positions within the Company "each individual defendant knew that the CLASS study data did not support Pharmacia's claim that Celebrex had a safety profile

superior to those of other NSAIDs." JA:0270-71 ¶ 76.

- "The numerous changes to the original [CLASS] protocol and the exclusion of unfavorable data demonstrate a conscious effort to deceive." JA:0271 ¶ 77.

Respondents contend that these meager allegations "demonstrate a conscious effort to deceive on the part of the defendants." JA:0271 ¶ 77. However, such conclusory assertions have routinely been rejected as insufficient to plead scienter. *See Maldonado v. Dominguez*, 137 F.3d 1, 10 (1st Cir. 1998) (holding that imputation of scienter to a defendant based on allegations that he "must have known" about the fraudulent activity by virtue of his position in the company are "precisely the types of inferences which [courts], on numerous occasions, ha[ve] determined to be inadequate to withstand Rule 9(b) scrutiny"); *Rosenbloom v. Adams, Scott & Conway, Inc.*, 552 F.2d 1336, 1339 (9th Cir. 1977) (same); *Winer Family Trust v. Queen*, 503 F.3d 319, 326 (3d Cir. 2007) (same).

Second, even assuming that Respondents' allegations constituted particularized allegations sufficient to create an inference of scienter, the Third Circuit was required to undertake the comparative analysis established in *Tellabs*. For example, the Third Circuit should have assessed whether the inference that Petitioners intended to deceive investors about the results of CLASS by publishing inaccurate or incomplete data is as cogent and compelling as the inference of non-fraudulent intent which arises from the undisputed facts that (i) before publishing the JAMA Article, Petitioners had submitted the complete CLASS data to the FDA for review, knowing that the FDA would publish the full data from CLASS; (ii)

Petitioners submitted their Briefing Document to the FDA Advisory Committee, which included both the analysis that Respondents now claim was misleading when published in the JAMA Article and the analysis that Respondents claim should have been published in the JAMA Article; (iii) Petitioners knew that their Alternative Analysis set forth in the Briefing Document would be subject to scrutiny as part of the FDA Advisory Committee process and that the basis for the Alternative Analysis would be publicly disclosed.

In addition, the Third Circuit should have assessed whether it is reasonable to infer that ten of the sixteen JAMA Article authors, who are not Pharmacia employees and are among the most-renowned experts in their fields, are likely to have recklessly or consciously risked their careers and reputations by agreeing to lend their names to a major publication that they did not believe was truthful and scientifically valid – especially when they knew that the complete CLASS data had already been disclosed to the FDA and would be used by the FDA to determine the request for a label change. *See DiLeo v. Ernst & Young*, 901 F.2d 624, 629 (7th Cir. 1990) (alleged motive to obtain fees insufficient to plead scienter: "An accountant's greatest asset is its reputation for honesty, followed closely by its reputation for careful work. Fees for two years' audits could not approach the losses [defendant] would suffer from a perception that it would muffle a client's fraud.... It would have been irrational for any of them to have joined cause with [their client]"); *Melder v. Morris*, 27 F.3d 1097, 1104 (5th Cir. 1994) (same).

Ultimately, the Third Circuit was required to determine whether it is more reasonable, compelling, and cogent to infer that when Petitioners recognized

(and fully disclosed) that CLASS failed to meet its primary endpoint, they presented an Alternative Analysis of the CLASS data to express their good-faith belief that CLASS nevertheless generated valuable data regarding the GI safety of Celebrex as compared to the comparator NSAIDs. In that regard, Petitioners' Alternative Analysis, set forth in the JAMA Article, reflected nothing more than a legitimate interpretation of scientific data, and a scientific dispute over competing interpretations of data cannot give rise to a strong inference of scienter.[12]

In light of the undeniably cogent and compelling inference of non-fraudulent intent that arise from the undisputed facts, the Third Circuit was required to engage in the comparative analysis mandated by *Tellabs* and its failure to do so merits the granting of a writ in this case.

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[12] *See In re MedImmune, Inc. Sec. Litig.*, 873 F. Supp. 953, 966 (D. Md. 1995); *Padnes v. Scios Nova, Inc.*, No. C 95-1963-MHP, 1996 WL 539711, at *5 (N.D. Cal. Sept. 18, 1996); *In re Biogen Sec. Litig.*, 179 F.R.D. 25, 38 (D. Mass. 1997).

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that this Court grant *certiorari* in the present case.

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